IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 350

WILLIAM G. BARR, *Petitioner*,

v.

LINDA A. MATTEO AND JOHN J. MADIGAN

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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PETITION FOR REHEARING

BYRON N. SCOTT,
RICHARD A. MEHLER,
Attorneys for Respondents.

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A "Memorandum to the Heads of All Departments and Agencies" issued July 13, 1959, by the Attorney General (see Appendix) makes it evident that both parties in the instant case interpret the decision as meaning that the existence or non-existence of "absolute immunity" or "absolute privilege" depends upon the determination of a question of fact, *i.e.* are the defamatory statements "issued in the course of their official duties."

The Attorney General says that "No Government official should assume that these decisions (Barr and Howard) give him full and complete protection against actions for defamation." If that be true, there is no "immunity" and the "privilege" is not "absolute" but rests upon a question of fact. Under the decision an official who issues a defamatory statement is "immune" to suit only if he can prove that the statement was made "in the course of the exercise of the duties of the office." This presents a question of fact for a jury unless it is a question upon which reasonable men could not differ.

As the Attorney General says, "there may be a close question as to whether a statement is in the line of duty within the meaning of the decisions." The majority opinion of Mr. Justice Harlan states that "the question is a close one." It does not state affirmatively that the issuance of the press release was within the scope of Mr. Barr's official business but only negatively that "we cannot say" that it was not.

Mr. Justice Black's concurring opinion states: "There is some indication in the Record (without indicating it) that there was an affirmative duty on Mr. Barr to give press releases like this," but immediately recedes from that position with a "but however that may be" and asserts that Mr. Barr's action was not forbidden by law or rule. The statement in the concurring opinion that "the press release was (not) plainly beyond the scope of Mr. Barr's official business" creates a doubt as to whether it was "plainly" within the "scope."

Mr. Barr said that at the time he issued the press release he didn't have the authority to fire or even suspend the respondents. He said that he had to wait until the following Monday to take the action because of this lack of authority. (R. 5, 15) There is nothing in the record to support the majority statement that petitioner was a "policy-

making executive official" or "an official of policy-making rank" when he issued the press release.

The dissenting opinion of Mr. Justice Stewart, on the same record, insists that the issuance of the press release was "beyond 'the outer perimeter of petitioner's line of duty' ".

Reasonable men do differ on the question of whether the press release was issued in the course of petitioner's official duties. The question is, therefore, one of fact to be left to a jury.

Having decided, as a matter of law, that an officer of this Government is immune to suit for libel regardless of his motives only if his defamatory statement is "action in the line of duty", the Court should have remanded the case for a new trial for a jury to determine whether:

1. Petitioner was acting "in the line of duty" when he issued the press release and, if not,

2. Whether he had reasonable grounds to believe that his statements were true, and

3. Whether he was actuated by malice.

It is respectfully urged that the Petition for Rehearing be granted and upon rehearing that the case be remanded for a new trial. The petition is presented in good faith and not for delay.

BYRON N. SCOTT,
RICHARD A. MEHLER,
Attorneys for Respondents.

APPENDIX

Memorandum to the Heads of All Departments and Agencies

The Supreme Court, on June 29, 1959, held that executive officers of the federal government have an "absolute privilege" for defamatory statements issued in the course of their official duties. (*Barr* v. *Matteo* and *Howard* v. *Lyons*). Thus, it confirmed a contention advanced by the Department of Justice that officials in the Executive Branch of government may not be held liable for damages for defamation as a result of statements made in the exercise of the duties of their offices.

The purpose of this memorandum is (1) to point out the extent and limitations of the privilege, and (2) to set forth the principles which should guide officials in the Executive Branch in the exercise of the privilege.

These decisions constitute a Supreme Court affirmation of a privilege that has long existed for many government officials. Any statement made in either House is privileged for the Constitution provides expressly that members of Congress "shall not be questioned in any other place." By Supreme Court decisions, this privilege was held applicable to the Judicial Branch of government in 1871 and cabinet officers in 1896. Since that time, the lower federal courts (with minor exceptions) have held that this privilege is not confined to cabinet officers, but extends to other executive officials performing important policy functions. In its decisions in *Barr* and *Howard*, the Court confirmed these precedents, ruling that it is not the title but the duties of the office which clothes the official with immunity from civil defamation suits.

The reason for recognizing this privilege was well stated by Mr. Justice Harlan: "It has been thought important that officials of government should be free to exercise their duties unembarrassed by the fear of damage suits in respect to acts done in the course of those duties—suits which

would consume time and energies which would otherwise be devoted to governmental service and the threat of which might appreciably inhibit the fearless, vigorous, and effective administration of policies of government."

1.

As to the extent and limitations of the privilege, although referred to as an "absolute privilege", it applies *only* to statements made in the course of the exercise of the duties of the office. The privilege does not apply to defamatory statements unrelated to official duties. Furthermore, there may be a close question as to whether a statement is in the line of duty of the office within the meaning of the decisions. (See dissent by Justice Stewart in the *Barr* case.) Thus, no government official should assume that these decisions give him full and complete protection against actions for defamation. Accordingly, should it become necessary for an official to issue a statement of a derogatory nature, care should be taken that the statement clearly pertains to the duties of the office and the official involved should himself be satisfied that he has the authority to issue it.

2.

Notwithstanding the existence of this privilege, officials of the Executive Branch of the federal government should act with an awareness of the vital importance of avoiding unnecessary injury to any person. An official who in the course of his official duties contemplates making a statement which might be deemed to be derogatory should be keenly aware of the heavy responsibility which falls on him. For as Justice Harlan said, "The privilege is not a badge or emolument of exalted office, but an expression of a policy designed to aid in the effective functioning of government." The privilege imposes therefore on all public officials a duty to act with care and restraint for

what may be at stake is the reputation of a person without legal recourse.

Furthermore, as the opinion points out "there are of course other sanctions than civil tort action available to deter the executive official who may be prone to exercise his functions in an unworthy and irresponsible manner." Although it is fully expected that the privilege will be exercised with care and thoughtful restraint (the Court points out that past experience indicates it will be) the reference to other sanctions undoubtedly includes disciplinary action or removal from office if official irresponsibility should be involved.